Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IDAHO PUBLIC UTILITIES COMMISSION	)	
PETITION FOR RULEMAKING PURSUANT	)	CC Docket No. ~~22-981~~ 98-221
TO SECTION 251(h)(2) OF THE	)	
COMMUNICATIONS ACT	)	
	)	

COMMENTS OF ELECTRIC LIGHTWAVE, INC.

Electric Lightwave, Inc. ("ELI"), by its attorneys, hereby files its comments in opposition to the Idaho Public Utilities Commission's ("IPUC") Petition for a Declaratory Ruling concerning Section 251(h)(2) of the Communications Act, as amended by the Telecommunications Act of 1996 ("the Act").[1] ELI is certificated to provide a full range of facilities-based and resold local exchange, intraexchange and interexchange private line services, and interexchange long distance services throughout the state of Idaho.[2] As a competitive local exchange carrier ("CLEC") engaged in the provision of telecommunications services in Idaho, ELI has a significant interest in the issues raised by the IPUC Petition.

I. INTRODUCTION

In its Petition, the IPUC requests the Federal Communications Commission ("Commission") to declare, pursuant to Section 251(h)(2) of the Telecommunications Act of 1996 ("Act") that: (1) CTC Telecom, Inc. ("CTC") should be treated as an incumbent local exchange carrier ("ILEC") for the purposes of Section 251(c); and (2) all similarly situated facilities-based local exchange carriers should be treated as ILECs. The IPUC asserts that CTC

[1] 47 U.S.C. §251(h)(2).

[2] In addition, ELI provides interstate telecommunications services in all fifty states, and is certified as a competitive local exchange carrier in Arizona, California, Minnesota, Nevada, Oregon, Utah and Washington.

should be regulated as an ILEC because it has entered into an "exclusive" agreement with the developer of a new planned community to provide local exchange service to residential and business customers within the new development.[3] ELI takes no position on whether CTC should or should not be subject to the obligations imposed by Section 251(c) of the Act. However, ELI believes it is important that the Commission examine each request presented to it under Section 251(h)(2) on a case-by-case basis.[4] ELI opposes the IPUC's request that the Commission issue a blanket rule regarding CLECs that are the first to provide facilities to a particular geographic area. Such a rule would be overly broad, anti-competitive, and contrary to the public interest.

It is clear from its petition that the IPUC is concerned with customer choice. ELI recognizes that this Petition was filed in response to that concern. An exclusive agreement between CTC and the developer of the Hidden Springs development which would limit the choices available to an end-user customer would be a legitimate public policy concern. It is only this sort of exclusive arrangement, however, that would make an entrant like CTC the "sole provider" of local exchange service to the new development and that could provide a new entrant with the means to act in an anti-competitive manner. ELI recognizes that the IPUC raises a valid concern in this respect. ELI, in general, is opposed to exclusive arrangements whereby consumers are deprived of the competitive choices that the Act was designed to create.

ELI believes that there are other, more pro-competitive, means for addressing concerns attendant with exclusive arrangements that limit end-users' choices, without encumbering all CLECs that venture into new territory with de jure ILEC status. For example, the IPUC has ample authority under state law to prohibit carriers from entering into exclusive arrangements that limit customer choice. It seems reasonable then that the IPUC's first action would be to

[3] The IPUC has not provided a copy of the agreement between the developer Hidden Springs Development and CTC, so it is impossible for parties to determine the extent to and manner in which the agreement confers exclusivity on CTC.

[4] This is consistent with the approach taken by the Commission to date. See Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of the Communications Act, CC Docket No. 97-134 (rel. July 20, 1998) ("Guam Order").

promulgate rules to designate what type of service arrangements would not be in the public interest. Given that sufficient protections can be developed under existing state authority, there is no need, and clearly no evidence, to support a blanket ruling declaring new entrants to be ILECs simply because they were the first to invest in the facilities to serve an area where no other provider had yet cared to do so.

Moreover, the Act already addresses situations where a CLEC is the first to have laid facilities in a given area. For example, under Sections 251(a) and (b) of the Act, among other requirements designed to promote competition, all CLECs are required to interconnect with other telecommunications carriers and to provide for the resale of their services. CLECs are also required, under Section 224 of the Act, to provide nondiscriminatory access to any pole, duct, conduit or right-of-way that they own or control. Congress mandated these specific interconnection provisions for new entrants precisely so that the interests of all carriers would be safeguarded, but limited the requirements on new entrants to avoid unreasonably burdening new entrants and thereby unwittingly discouraging investment. A blanket rule treating CLECs as ILECs simply because they make an investment would be unnecessary, counter-productive and in direct conflict with the public policy expressed in the Act.

The broad reach of the IPUC's requested blanket rule is evident on the face of the Petition. The IPUC requests that the Commission adopt a rule designating for ILEC status, the class of local exchange carriers that after February 8, 1996:

> began to provide telephone exchange service exclusively over their own telecommunications service facilities, or predominantly over their own facilities in combination with the resale of telecommunications services of another carrier, to customers in a geographic area in which no other telephone corporation has facilities capable of providing basic local exchange service to customers.[5]

Although the IPUC states that this class of carriers would include all local exchange carriers similarly situated to CTC, it actually encompasses a significantly broader group of carriers. The

[5] IPUC Petition at 12-13.

proposed definition that the IPUC would have this Commission adopt does not limit the class to those local exchange carriers with exclusive access to a previously unserved area. The broad application of ILEC status to any non-ILEC carrier that is the first to invest in building facilities to a given area would create a tremendous burden and a formidable disincentive for non-ILEC carriers to compete for new customers.

There is clearly much more involved in being an ILEC than merely being the first carrier to place facilities in an area. ILECs continue to hold a monopoly over all local exchange markets. They control ubiquitous networks of tremendous scope and scale. ILECs also continue to benefit disproportionately from the regulatory status quo, which was implemented primarily in the pre-1996 Act monopoly marketplace.

The Commission should only consider applying ILEC status to a non-ILEC, or class of non-ILECs, where it has truly replaced an existing ILEC, and not where a non-ILEC has simply competed against an ILEC for new customers by placing facilities first. At this point in the evolution of local competition, such determinations are best made on a case-by-case basis.

II. THE IPUC HAS AUTHORITY UNDER IDAHO LAW TO ADDRESS ITS CONCERNS WITH EXCLUSIVE SERVICE ARRANGEMENTS.

The IPUC states repeatedly throughout its petition that it is concerned that CTC will have exclusive access to the customers in the Hidden Springs Development, a new development of approximately 900 residences and businesses.[6] The IPUC argues that CTC, by virtue of its exclusive arrangement, can "insist on supracompetitive prices for interconnection, resale, or impose other unreasonable conditions for terminating calls from [another carrier's] customers to its customers."[7] The IPUC asserts that it adopted interim rules imposing Section 251(c) obligations on all "non-incumbent telephone corporations" that serve "new telecommunications

[6] IPUC Petition at 2 ("Only CTC will have facilities-based service in the Hidden Springs Development.");

[7] IPUC Petition at 6.

development area[s]" to address these concerns.[8] These IPUC actions, however, are overly burdensome to new entrants and simply not necessary to protect the interest of Idaho consumers.

The IPUC has broad authority under Idaho law to regulate both ILECs and CLECs.[9] The IPUC could prohibit carriers from entering into exclusive arrangements that have the effect of barring other carriers from serving a particular group of customers. The adoption of regulations prohibiting carriers from entering into any type of arrangement with private property owners that has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers would directly address the IPUC's concerns, without imposing unnecessary restrictions on new entrants. Not only would such regulations prohibit CTC or others from engaging in the anti-competitive conduct predicted by the IPUC, but it also would have a broad, pro-competitive impact on Idaho consumers, by ensuring a choice of telecommunications providers.

The California Public Utilities Commission ("CPUC") recently addressed similar issues regarding exclusive access in its ongoing local competition docket.[10] In a decision addressing competing carriers' access to rights-of-way, the CPUC concluded that the adoption of rules to facilitate carriers' ability to obtain nondiscriminatory access to customer premises is consistent with the policy of opening all telecommunications markets to competition. The CPUC stated:

> [A]n agreement which provides for the exclusive marketing of ILEC services to building tenants may be improper if the agreement has the effect of preventing a CLC from accessing, and providing service to, a building because of the building owner's financial incentives under the marketing agreement. Similarly, a situation in which a building owner, either for convenience or by charging disparate rates for access, favors the access of the ILEC

[8] See IPUC Petition at Appendix B.

[9] Idaho Code §61-501 provides: "The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and the intent of the provisions of this act."

[10] Public Utilities Commission of California, R-95-04-043, Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Decision 98-10-058 (Oct. 22, 1998) ("CPUC Decision No. 98-10-058").

> to the detriment of a CLC will also be in violation of our rules herein.[11]

Accordingly, the CPUC adopted a rule prohibiting any LEC from entering into such agreements.[12] The IPUC could take a similar approach here. The IPUC could directly address issues concerning exclusivity under state law by prohibiting carriers and other utilities from entering into such arrangements. Though Hidden Valley Development is not a building, the principles at stake are the same where exclusivity extends over any parcel of private property. Such a decision would be in keeping with the Idaho legislature's policy under Section 62-602 of the Idaho Code to ensure the existence of actual competition in a local exchange calling area through the availability of "both service provider and service option choices."[13]

III. THE COMMISSION SHOULD NOT IMPOSE ILEC STATUS ON THE CLASS OF CARRIERS PROPOSED BY THE IPUC.

Because the facts presented here do not satisfy the conditions set forth in Section 251(h)(2) of the Act, and because the IPUC has sufficient authority to address the issue of exclusive service agreements at the state level, the Commission must decline the IPUC's invitation to promulgate unnecessary rules that will impede rather than facilitate competition. The IPUC's proposal would only serve to strengthen the control of ILECs, such as U S WEST Communications, Inc. ("USWC"), over consumers' freedom of choice in telecommunications service providers. Increasing the regulatory burden on new entrants seeking to bring competition to the monopolistic local exchange market clearly would be contrary to the public interest and is not justified by the IPUC's Petition.

The Commission may, by rule, provide for the treatment of a CLEC as an ILEC only if the following three conditions in Section 251(h)(2) are met:

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[11] CPUC Decision No. 98-10-058 at 98.

[12] Id.

[13] See Idaho Code §62-602(2). "It is the intent of this legislature that effective competition throughout a local exchange calling area will involve a significant number of customers having *both service provider and service option choices* and that *actual competition means more than the mere presence of a compe*titor. Instead, for there to be actual and effective competition there needs to be substantive and meaningful competition throughout the incumbent telephone corporation's local exchange calling area." (Emphasis supplied).

1. such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an ILEC as that term is defined in Section 251(h)(1) of the Act;

2. such carrier has substantially replaced an ILEC; and

3. such treatment is consistent with the public interest, convenience, and necessity and the purposes of Section 251.

The conditions of Section 251(h)(2) would not be met as applied to "similarly situated carriers", as proposed by the IPUC. Clearly, Section 251(h)(2) was not intended by Congress to result in the type of sweeping overly broad rules recommended by the IPUC.

A. CLECs must occupy a position in the market that is comparable to the position occupied by the ILEC.

1. IPUC Definition of "Market" is Inadequate

The IPUC Petition does not even begin to seriously address the requirements of Section 251(h)(2)(A). The IPUC petition appears to be based on the claim that any area to which facilities have not previously extended, regardless of size, or proximity to served areas constitutes a separate market. In fact, only if the Commission accepts that proposition could it begin the rest of its analysis as to whether a CLEC occupies a position in such a "market" that is comparable to the ILEC. Not only is such a definition of "market" completely unfeasible as a practical matter, there is no basis for it in any Commission precedent.

The flaw in the IPUC's arguments relating to a definition of "market" for purposes of Section 251(h)(2) is clear. For example, the IPUC's temporary rules would apply to any geographic area to which no facilities currently extend irrespective of the fact that the area may be certificated to an ILEC, and irrespective of whether or not the ILEC was already serving adjacent areas. This means that any new subdivision in the expanding suburbs of the Boise metropolitan area would qualify, even if U S WEST had facilities in areas surrounding the new development.[14] There are numerous pieces of undeveloped property in and around Boise that

[14] In fact, the Hidden Springs Development, which includes approximately 900 residences and buildings, is just minutes from downtown Boise.

would qualify under such a definition, even though they lie within U S WEST exchange local exchange boundaries. Even worse, taken to its logical extreme, the effect of the IPUC's proposed rule would even classify shared tenant services providers who provide service to apartment complexes as ILECs. Clearly, the IPUC's requested blanket rule would create a slippery slope towards imposing ILEC status on providers who in no way resemble, perform, or occupy a position in the market comparable to an ILEC.

In addition, the IPUC's reliance on the Commission's decision declaring ILEC status for the Guam Telephone Authority ("GTA") is misplaced.[15] For all practical purposes, the GTA, which provides service to 100% of the island of Guam, is no different from an ILEC. It is the historical monopoly provider of services with captive ratepayers. The Guam Order not only points out the need to correctly define the "market" for the purposes of Section 251(h)(2) (i.e., the island of Guam as compared to an undefined range of "unserved areas"), but it provides no support to applying ILEC regulation to new entrants.[16] In no conceivable fashion could the GTA be described as a new entrant. The Guam Order simply corrected a loophole in the statutory definition that had permitted a monopoly carrier to avoid ILEC status merely because it was not a member of the National Exchange Carrier Association ("NECA") at the time the 1996 Act was passed.[17] The Guam Order does not support the much more far-reaching assertions made by the IPUC.

2. Even if the Commission accepted the IPUC's "market" definition, facilities-based CLECs would not occupy a position in that market comparable to an ILEC.

The IPUC argues that CLECs who enter into exclusive contracts to provide the first facilities-based local service in a new development occupy a position in the market for telephone

[15] Guam Order.

[16] Id. at para. 9. In fact, the Commission declined to adopt a rule treating as ILECs all members of a class of local exchange carriers similarly situated to GTA, because the Commission concluded that it had no evidence that there were any other such carriers.

[17] GTA is now a member of NECA.

exchange services in that new development that is comparable to the position occupied by an ILEC.[18] As stated above, ELI generally opposes provisions for exclusive access to any group of customers. However, the IPUC's request would have this Commission confer ILEC status on a class of carriers which, as defined by the IPUC, may or may not have entered into exclusive arrangements. Where there is no exclusive arrangement, there is simply not the same level of concern that CLECs will act in an anti-competitive manner that limits customers' choice of providers.

Any carrier can build out facilities to a previously unserved area. Unlike ILECs, however, CLECs do not and have never had a guaranteed rate of return on their investment.[19] A CLEC bears the sole risk that it will recoup its infrastructure investment in a deregulated market. Clearly, a CLEC that assumes the business risk of being the first to provide telecommunications infrastructure to a new development cannot be viewed as occupying the same market position as an ILEC, such as USWC, that is guaranteed a fair return on its investment should it choose to be the first to provide the same infrastructure. CLECs also do not have the size and scope of the ILECs' ubiquitous networks. To impose ILEC status on a new entrant because it has attempted to compete in the provision of facilities to a new set of customers is completely unwarranted.

The fact that a CLEC may be the first provider to make the investment in order to serve a newly developed area does not lead to the conclusion suggested by the IPUC that other carriers would not be able to provide competing service. As discussed in detail above, the Act provides for interconnection and resale between new entrants and other carriers under Section 251 (a) and (b); therefore, other carriers have an equal opportunity to build facilities and interconnect, or to negotiate with the new entrant to resell its services, pursuant to Section 251(b)(1). Subsequent facilities-based carriers could also gain access to the poles, ducts, conduits and rights-of-way of the initial CLEC provider under Section 224. Given the safeguards put in place by the Act, there

[18] See IPUC Petition at 7 - 9, 11.

[19] For example, the IPUC's proposed interim rules ignore the fact that USWC and other ILECs throughout most of Idaho have rate recovery protection for basic local exchange services pursuant to Tile 61 of the Idaho Code.

is simply no basis for the IPUC's concerns that a CLEC, having built the initial facilities to an area, will "bottleneck" access to that area.[20] Moreover, a CLEC, even after investing and building facilities to new customers, will still be at a competitive disadvantage compared to the true ILEC that has more a more ubiquitous network. Therefore, because CLECs will still need to negotiate interconnection terms for local transport and termination with ILECs, CLECs will still be highly motivated to negotiate in good faith with ILECs wanting to interconnect with them. Obviously, lack of interconnection on fair and equal terms would come back to haunt a new entrant and cause significantly greater injury to its own provision of service than to the ILEC's.

B. A CLEC building facilities to any previously unserved area is not sufficient to demonstrate that the ILEC has been substantially replaced.

A CLEC that is the first facilities-based carrier to provide service to a new development within an ILEC's exchange service territory has not, contrary to the IPUC's argument, "substantially replaced" the ILEC. A colorable argument that an ILEC has been "substantially replaced" can only be made if there is, in fact, an exclusive service arrangement. Even so, the ILEC continues to have carrier of last resort obligations within its exchange territory, pursuant to Section 62-612, Idaho Code.[21] The carrier of last resort obligation is a public policy initiative of the state of Idaho that exists irrespective of the business plans of new entrants. It is designed to ensure that all consumers within a certificated area have access to telecommunications services. A new entrant, therefore, is merely providing opportunities for service beyond what the state has already secured through its initial certification of the area. If an individual builds a house or establishes a business within an ILEC's exchange territory, that person can still demand service from the ILEC under its line-extension tariff, regardless of whether the ILEC currently has the

[20] IPUC Petition at 8-9.

[21] The IPUC's Petition does not speak to CLECs who build facilities into "unserved areas" as that term has been used historically (e.g., areas lying outside the exchange boundaries of any carrier). Instead, the IPUC seeks the imposition of ILEC status on CLECs who build facilities to new customer premises that lie within an ILEC's exchange boundaries.

necessary infrastructure in place.[22] Thus, if a CLEC has facilities and provides service within an ILEC's exchange territory, the ILEC has not been substantially replaced, even if the CLEC does have an exclusive service agreement. The CLEC's presence does not relieve the ILEC of its statutory or contractual duties under its tariff. The CLEC does not, therefore, serve as a "substitute for or successor of" the ILEC under Idaho law as argued by the IPUC at page 9 of its petition.

Furthermore, the issue of whether a CLEC has replaced an ILEC should be a factual inquiry requiring a clear demonstration that in fact the CLEC has assumed the role of the ILEC in that market. The Commission should not even consider declaring an entire class of carriers to be ILECs without sufficient evidence that such a group of carriers had indeed broadly replaced ILECs, and that there were strong public interest factors in favor of such a sweeping decision. The imposition of ILEC status on a non-ILEC carrier that has not enjoyed the monopoly history and guaranteed rate of return that real ILECs have received is contrary to the intent of the Act. The imposition of any additional regulatory burdens on new entrants must be clearly justified by strong factual evidence that supports the existence of anti-competitive behavior and should never be applied without such a demonstration.

C. Treatment of CLECs as ILECs for Section 251(c) purposes is not in the public interest and is contrary to the purposes of Section 251.

Finally, a general rule treating all CLECs as ILECs for Section 251(c) purposes simply because they are the first to provide facilities-based telecommunications services in a new development is not in the public interest, as required by Section 251(h)(2)(C) of the Act, and would be directly contrary to the competitive purposes of Section 251. While the IPUC is to be commended for recognizing the potential harm that results from an exclusive service agreement, the "solution" proffered by the IPUC only exacerbates the anticipated harm: impediment of competition. Contrary to the intent of the Act, the IPUC's proposed rule creates a disincentive

[22] See e.g., USWC Basic Local Exchange Tariff No. 4., IPUC Advice No. 97-15-S.

for CLECs to venture into any undeveloped portion of an ILEC's exchange territory, because to do so would result in the CLEC becoming a de jure ILEC for purposes of Section 251(c) of the Act, while shouldering the entire risk associated with its capital investment. The ILEC, on the other hand, would suffer no additional burden should it choose to further expand its already dominant presence by being the first facilities-based telecommunications service provider to enter into the same development. Rather than "opening all telecommunications markets to competition" as Congress intended, the rule proposed by the IPUC punishes CLECs for opening up areas not currently "served" by the market dominant ILEC. The unintended consequence of the IPUC's requested rule would be to create an additional barrier to competitive entry. CLECs would have a newly created disincentive to build out to new customer premises. This would, in effect, reserve new customer premises for the ILECs, who have nothing to lose by building out to new developments in the exchange territories. This result would clearly be contrary to the public interest and inconsistent with the Congressional intent underlying the Act.

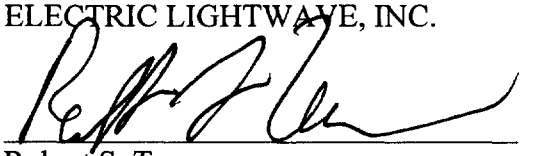
IV. CONCLUSION

For the reasons stated herein, the Commission should deny the IPUC's request for a rule of general applicability that treats all facilities-based local exchange carriers as ILECs that, after February 8, 1996, "began to provide telephone exchange service exclusively over their own telecommunications service facilities, or predominantly over their own facilities in combination with the resale of telecommunications services of another carrier, to customers in a geographic area in which no other telephone corporation has facilities capable of providing basic local exchange service to customers." The IPUC has failed to demonstrate that its proposed class of carriers meets the standards of Section 251(h)(2). The IPUC has narrower remedies available under Idaho state law to protect Idaho consumers from exclusive arrangements between carriers and developers, and the Act provides subsequent carriers with a number of other means for competitive entry.

Dated this 11th day of January, 1999.

Respectfully submitted,

ELECTRIC LIGHTWAVE, INC.



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CERTIFICATE OF SERVICE

I, Robert S. Tanner, an attorney in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Comments of Electric Lightwave, Inc." was served on the persons specified below, by U.S. Mail, First Class, Postage Prepaid, on January 11, 1999:

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